PP

v.

SIDEK ABDULLAH

HIGH COURT MALAYA, SHAH ALAM
HISHAMUDIN YUNUS J
[CRIMINAL TRIAL NO: 47-5-1999]
30 DECEMBER 2005
(31 JANUARY 2005)

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis (by way of sale) - Proof - Agent provocateur - Agent provocateur showing accused cash money for purchase of drugs and was shown drugs in boot of car - Whether proving sale - Whether offence one of possession - Whether charge to be amended - Dangerous Drugs Act 1952, ss. 6, 39B(1)(a), 39B(2)*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Prima facie case - Sufficiency of proof - Whether upon a minimal evaluation of evidence - Whether upon a maximum evaluation thereof - Whether maximum evaluation means 'provisionally' beyond reasonable doubt - Criminal Procedure Code, s. 180*

The accused sought to sell some 44kg of cannabis to the agent provocateur, PW12, at a certain agreed price. On 5 May 1998, to transact the sale, the parties met at Hulu Bernam Road, Tanjong Malim. Both arrived at their place of rendezvous by car, with the accused driving a white Proton Saga bearing registration number AW 163 and accompanied by three alleged 'drug riders', namely Mat Nor, Susyaimee and Hassan. PW12 then showed the accused the RM75,000 cash with which he intended to purchase the drugs, whereupon the accused, in reciprocity, opened the boot of car AW 163 and showed PW12 two sling bags containing the subject drugs. Having seen the drugs, PW12 alerted the police surveillance team in the area, and the accused and the riders were hence arrested and the drugs seized.

At the trial of the accused on a charge of trafficking in 44,023.30g of cannabis under s. 39B(1)(a) Dangerous Drugs Act 1952 ('DDA') herein, the prosecution could not call in Mat Nor, Susyaimee and Hassan, who had since absconded, as their

witnesses, and in the circumstances sought to tender the trio's statements under s. 112 Criminal Procedure Code ('CPC') as documentary evidence pursuant to s. 32(i) & (j) Evidence Act 1950.

However, quite apart from the s. 112 statements, it was the prosecution's submission, at the close of its case, that the evidence as adduced – upon a minimal evaluation – was sufficient to prove a *prima facie* case of trafficking (by way of selling the offensive drugs) against the accused, and therefore exhorted the court to call for the accused's defence thereon. Objecting, the defence submitted that a minimal evaluation of the standard of proof (as so eloquently enunciated in *Haw Tua Tau v. PP* [1981] 3 AER 14, and assiduously followed by our courts *inter alia* in *Ragunathan v. PP* and *Junaidi Abdullah v. PP*) could no longer be good law as, apart from the same not having been followed by the subsequent Federal Court judgments of *Khoo Hi Chiang v. PP* [1994] and *Arulpragasan a/l Sandaraju v. PP* [1996], the principle had also, most recently, been discarded by the Court of Appeal in *Looi Kow Chai v. PP* [2003] 1 CLJ 734 and the Federal Court in *Balachandran Selvaratnam v. PP* [2005] 1 CLJ 85.

The accused, hence, argued that the court, rightly and legally, ought to embark on a maximum evaluation of the evidence so adduced by the prosecution.

The learned DPP however insisted still that the correct principle to follow in determining whether or not a *prima facie* case had been made out would be the minimal evaluation principle as enunciated by the Privy Council in *Haw Tua Tau*, arguing that to do so would accord with Parliament's intention. It was argued that both *Looi Kow Chai* and *Balachandran*, in enunciating the principles of 'maximum evaluation' and 'provisional beyond reasonable doubt', had given the words '*prima facie* case' in s. 180 CPC a meaning not intended by Parliament, considering that the latter, when amending that section in 1997 (*vide* the Criminal Procedure (Amendment) Act 1997), had singularly sought to restore the minimal evaluation principle of *Haw Tua Tau*, and nullify the effect of *Arulpragasan Sandaraju*.

And so it was that, upon the obtaining facts and circumstances, at the end of the prosecution's case, it fell upon the learned trial judge to deliberate on the effect and ramifications of the authorities aforesaid (and some others), before proceeding to answer the questions on: (i) the proper standard of proof to apply at the end of the prosecution's case; and (ii) whether the evidence, upon its proper evaluation, had established a *prima facie* case of trafficking against the accused.

Held (amending charge to one of possession under s. 6 DDA upon a maximum evaluation of the evidence):

[1] The statements made by Mat Nor, Susyaimee and Hassan were inadmissible in evidence. The onus was on the prosecution to satisfy the court that the requirements of s. 32 of the Evidence Act 1950 were satisfied. On the facts, the prosecution could not establish that the persons could not be found, or that their attendance, under the circumstances, could not be secured without unreasonable delay or expenses. Persons such as Mat Nor, Susyaimee and Hassan, once they ceased to be under detention, were likely to abscond. Yet, remarkably, no efforts were made by the police to ensure that they would not abscond or would attend trial. The later efforts to trace them were too late and rather of lip service in nature.

[2] The pronouncements of Lord Diplock in *Haw Tua Tau* on the minimal evaluation principle were in consonance with the principles of fair hearing. The principle was followed by our courts in *Ragunathan v. PP* [1982], *Pavone v. PP* [1984], *Munusamy v. PP* [1987], *Junaidi Abdullah v. PP* [1993] and *Tan Boon Kean v. PP* [1995], and adopted by the Singapore Court of Appeal in *Roseli bin Amat v. PP* [1989], *Ng Theng Shuang v. PP* [1995]; *Sim Ah Cheoh v. PP* [1991], *PP v. Gan Lim Soon* [1993] and *PP v. Wong Wai Hung* [1993] and the Brunei Court of Criminal Appeal in *Yeo Tse Soon v. PP* [1995]. The principle, further, was applied in New Zealand and Australia, as exemplified by *Auckland City Council v. Brailey* [1987] and *May v. Sullivan* [1995].

[3] Bearing in mind the Explanatory Statement to the Criminal Procedure (Amendment) Bill [which sought to amend s. 180 CPC] and the Minister's speech in Parliament when moving the Bill, the judgments of the Court of Appeal in *Looi Kow Chai* and the Federal Court in *Balachandran* on the meaning of the words '*prima facie* case' as found in s. 180 CPC were contrary to the intention of Parliament. The judgments, whilst rejecting the minimal evaluation principle of *Hau Tua Tau*, sought to revive the twin principles of 'maximum evaluation' and 'provisional beyond reasonable doubt' as enunciated in *Arulpragasan Sundaraju* – the very principles sought to be abrogated by the Criminal Procedure (Amendment) Act 1997.

[4] With the greatest of respect, the Court of Appeal and the Federal Court respectively in *Looi Kow Chai* and *Balachandran* ought not to have revived the maximum evaluation principle in *Arulpragasan Sandaraju*. Further, as was prescribed by s. 17A of the Interpretation Acts 1948 and 1967, the Court of Appeal and the Federal Court, in interpreting the words '*prima facie* case' in s. 180 CPC, ought to have adopted a purposive approach thereto.

[5] This court, however, was in no position not to follow *Looi Kow Chai* and *Balachandran*. Notwithstanding the misgivings and reservations expressed against these cases, the court was bound by the basic principle of binding precedent, and must, therefore, respect and follow those decisions.

[6] Applying the principle of maximum evaluation to the evidence, the prosecution had failed to establish against the accused a *prima facie* case of selling cannabis on the Hulu Bernam Road on the day in question. Although there was evidence that the accused was driving car AW 163 along that road and that the boot of the car contained a large quantity of cannabis, yet there was no evidence whatsoever that a sale transaction had ever taken place as between he and PW12.

[6a] However, the accused, as at the time of arrest, was the driver and the person in possession of car AW 163 that was found to contain drugs. The evidence also showed that he was aware of the presence of the cannabis in the boot of the car. That being so, the prosecution had established against him a *prima facie* case of the commission of the offence of possession of the specified quantity of cannabis under s. 6 DDA punishable by s. 39A(2) thereof. Accordingly, the charge was amended to one under s. 6 DDA.

[7] The accused had pleaded guilty to the amended charge. Considering the large quantity of the cannabis, the plea of guilty and the fact that the accused had no criminal record and had shown remorse, he was sentenced to 12 years' imprisonment with effect from the date of arrest. In view of his age (54 years), he was however spared the sentence of whipping.

Case(s) referred to:

Arupragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Auckland City Council v. Brailey [1988] 1 NZLR 103 ***(refd)***
Balachandran Selvaratnam v. PP [2005] 1 CLJ 85 FC ***(refd)***
DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikin Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***
Haw Tua Tau v. PP [1981] 3 All ER 14 ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***
Looi Kow Chai v. PP [2003] 1 CLJ 734 CA ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 SC ***(refd)***
May v. Sullivan [1954-55] 92 CLR 654 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Ng Theng Shuang v. PP [1995] 2 SLR 36 ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oil Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Pavone v. PP [1984] 1 MLJ 77 ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan [2002] 4 CLJ 105 FC ***(refd)***
PP v. Gan Lim Soon [1993] 3 SLR 261 ***(refd)***
PP v. Omar Lopez [1967] 2 MLJ 281 ***(refd)***
PP v. Wong Wai Hung [1993] 1 SLR 927 ***(refd)***
R v. Galbraith [1981] 1 WLR 1039 ***(refd)***
Ragunathan v. PP [1982] CLJ 25; [1982] CLJ 63 FC ***(refd)***
Roseli Amat [1989] 2 MLJ 65 ***(refd)***
Sim Ah Cheoh v. PP [1991] 2 MLJ 353 ***(refd)***

A *Tan Ah Ting v. PP [1974] MLJ 37* ***(refd)***
Tan Book Kean v. PP [1995] 3 MLJ ***(refd)***
United Malacca Bhd v. Pentadbir Tanah Daerah Alor Gajah [2002] 4 CLJ 177 FC ***(refd)***
Yeo Tse Soon v. PP [1995] 2 CLJ 179 CA ***(refd)***

B **Legislation referred to:**
Criminal Procedure (Amendment) Act 1997, s. 180
Criminal Procedure Code, ss. 112, 180, 289(c)
Dangerous Drugs Act 1952, ss. 2, 6, 39A(2), 39B(1)(a), (2)
Dangerous Drugs (Special Preventive Measures) Act 1985, s. 3(1)
C Evidence Act 1950, s. 32(i), (j)
Interpretation Acts 1948 and 1967, s. 17A

Criminal Procedure Code [Sing], s. 188

Other source(s) referred to:
D *Practice Note [1962] 1 All ER 448*

For the prosecution - Ishak Mohd Yusof DPP
For the accused - Rusli Zain; M/s Rusli Zain & Co

Reported by WA Sharif

E

JUDGMENT

Hishamudin Yunus J:

F In this criminal trial, the charge against the accused is as follows:

> Bahawa kamu pada 5 Mei 1998, jam lebih kurang 7.40 malam di tepi jalan besar Hulu Bernam, di dalam daerah Hulu Selangor di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya, iaitu, 44,023.3 gram cannabis, dan oleh itu, kamu telah
G melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

The above charge is for the capital offence of drug trafficking, an
H offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). If convicted, as so stipulated by s. 39B(2) of the same Act, the imposition of the death penalty is mandatory.

I

At the end of the case for the prosecution, having carefully considered the whole evidence presented by the prosecution, as well as the submissions of both sides (ie, prosecution and defence), I found that the prosecution had failed to establish against the accused a prima facie case of trafficking in cannabis.

However, I had ruled that the prosecution had succeeded in establishing a *prima facie* case of possession of 44,023.3 grams of cannabis at the specified time, place and date. Accordingly, I amended the charge to that of an offence under s. 6 of the DDA, an offence punishable under s. 39A(2) of the same Act. Having so amended the charge, the accused was called upon to enter his defence on the amended charge. The three options (elections) were explained to him. The accused pleaded guilty on the amended charge. He was, accordingly, sentenced to 12 years' imprisonment.

The prosecution evidence was that on 5 May 1998, at about 7.40pm, as a result of a police surveillance and operation headed by DSP Yunus (PW14) of the Narcotics Department, Bukit Aman, Kuala Lumpur, the accused was arrested by Chief Inspector Azmi (PW9), also from the Narcotics Department, at the Hulu Bernam Road ('Hulu Bernam' is sometimes spelt as "Ulu Bernam'), very near to the town of Tanjong Malim. At the time of the arrest, the accused was driving a white Proton Saga car bearing registration number AW 163. The accused was arrested when he stopped his car very close to a Shell petrol station situated along the Hulu Bernam Road. According to PW9, he and three other police officers (who were part of a 'strike team' headed by one ASP Rahim Shariff participating in the operation) were in their stationary car by the side of the road and keeping a look out for the accused's car. Upon seeing the accused's car approaching from the direction of the town of Tanjong Malim and passing in front of his (PW9's) position, PW9 immediately drove out and followed the accused's car. A little while later the accused's car stopped just after passing a Shell petrol station, and seeing this PW9 used his car to block the accused's car at the rear, while another car driven by another police officer, ASP Abdul Rahim Sharif, blocked the accused's car at the front. The accused was asked to alight and to open the boot of his immobilised car. In the boot, PW9 found two blue sling bags (P19 and P20), one containing 21 packets and the other containing 24 packets; and these packets contained substances suspected of being cannabis.

The suspected substances were sent to the Chemistry Department for analysis. The Government chemist, Encik Cheong Meow Kioon, PW5, who carried out the analysis, confirmed the substances to be cannabis, weighing 44,023.3 grams.

The most important prosecution witness, however, is Detective Corporal Omar Haji Abdul Rahim (PW12) from the Narcotics Department, Bukit Aman, Kuala Lumpur, who acted as agent provocateur. PW12 in his testimony said that in February 1998, pursuant to information received from a 'source' (ie, an informer) pertaining to drug trafficking activities, he was instructed by his superior officer, PW14, to carry out a covert (undercover) operation. As the narration goes, with the help of this source, he was introduced to the accused at the Lake Garden, Taiping, on 23 February 1998. At that first encounter, PW12, under the pretext of being a drug trafficker from Johor Bharu, and introducing himself as 'Pak Din', inquired from the accused whether the latter could supply him with 20 kilogram of cannabis. The accused, agreeing, told PW12 that the cannabis, if delivered directly to him (PW12), would cost RM1,700 per kilogram. PW12 agreed on the price. The accused, however, told PW12 that he ran out of supply of cannabis. He gave PW12 his hand-phone number and told PW12 to contact him in two weeks' time, to which PW12 agreed.

According to PW12, he did not, however, contact the accused in two weeks' time. He only phoned the accused on 25 March 1998. The accused chided PW12 for not having contacted him earlier as agreed. The accused told PW12 that the stock did arrive, and since PW12 did not contact him, he had sold the stock to someone else. The accused further told PW12 that a new stock would arrive in two days' time.

According to PW12, on 27 March 1998 the accused phoned him to say that the supply would arrive in two days' time and inquired from PW12 as to the quantity that the latter wanted. PW12 said in evidence that he told the accused that he wanted 50 kilogram and would like the transaction to take place at Tanjong Malim.

It is the evidence of PW12 that from then (ie, 27 March) onwards until 4 May 1998 he and the accused were, from time to time, in communication with one another either by phone calls or personal meetings to discuss the intended transaction. But I do not propose to give a detail account of these communications.

It is the evidence of PW12 that, subsequently, on 4 May 1998 the accused contacted him by phone to say that he would be able to supply PW12 50 kilogram of cannabis at the price of RM1,500 per kilogram, and that the total cost would be RM75,000; and he asked PW12 to come to Tanjong Malim the following day (5 May 1998), in the afternoon, for the transaction. PW12 immediately briefed his superior officer, PW14, of the communication. PW14 instructed PW12 to bring along to the place of transaction L/Cpl Badrim who would be bringing the money (RM75,000 in cash form) as well as being PW12's escort.

Hence, for the purpose of the intended transaction, on 5 May 1998, in the afternoon, PW12 and L/Cpl Badrim arrived at the Ulu Bernam PLUS rest and recreation complex. They arrived in a Proton Wira car bearing a false registration number plate 'BDE 5318'. From there PW12 contacted the accused by phone. The accused suggested that they meet up for the transaction at the Tanjong Malim rest house. PW12 suggested that they meet up somewhere else instead on the ground that it was not safe to meet up at the rest house. The accused then suggested that they meet up at the Tanjong Malim toll plaza, to which suggestion PW12 agreed.

PW12 said in evidence that every communication between him and the accused was relayed to his superior officer, PW14, who, as leader of the operation, followed (from a distance) and monitored every movement of PW12 and of the accused.

It is the further evidence of PW12 that at the toll plaza he met the accused. The accused arrived in a white Proton Saga bearing registration number AW 163. PW12 parked his car at an open space near the public toilet of the toll plaza and walked up to the accused's car which was parked at a road shoulder about 100 meters away from the plaza, leaving behind Badrim in the Proton Wira to guard the cash money. As PW12 walked up towards the accused's Proton Saga, he saw the accused and two male Malays emerged from the accused's car. PW12 inquired from the accused about the drug. The accused replied that the supply was available and ready but he had it kept at a place nearby. The accused then introduced to PW12 one of the two male Malays that was with him. The accused introduced him as 'Mat Nor', his friend from Thailand. At the same time the other male Malay (PW12 later came to know him as 'Susyaimee') conducted a body search of

PW12. The accused, according to PW12, wanted to look at the money. PW12 told the accused that the money would be shown to the accused alone. PW12 led the accused to his Proton Wira where Badrim was and showed the accused the RM75,000 cash that was with Badrim. Having seen the money, the accused returned to his car, at the same time asking PW12 to follow his car (AW 163) to the Tanjong Malim rest house.

PW12 testified that he and Badrim arrived at the Tanjong Malim rest house at about 6.45pm. From PW12's evidence it would seem that he and Badrim did not arrive at the rest house at the same time as the accused. For, according to PW12, upon arrival he parked his car in the compound of the rest house (but at some distance away from the rest house), and when he got out from his car he saw the accused was already seated on a concrete/stone bench in front of the rest house. The accused's car (the Proton Saga AW 163) and the two male Malays (Mat Nor and Susyaimee), who were at the toll plaza earlier, were nowhere to be seen. PW12 approached the accused. Badrim, according to PW12, remained seated in the Proton Wira. The accused gestured to PW12 to sit next to him on the bench and said to PW12 not to be angry as he had only 45 kilograms of cannabis instead of 50 kilograms. PW12 replied that that did not matter. The accused then asked PW12 to hand over the money to him for 45 kilogram worth of cannabis. PW12 told the accused that that could not be done yet: for the money that he had brought was for 50 kilogram; and, therefore, in view of the change in quantity (to only 45 kilogram), he had first to ask his partner (meaning, Badrim) to set aside the money just for 45 kilogram of cannabis. PW12 asked the accused about the drug and the latter replied that it was on the way and would be arriving at any moment. PW12 then went to his car and informed Badrim that the drug was on the way and instructed him to alert the strike team.

PW12 further testified that about 15 minutes later he saw the Proton Saga AW 163 (ie, the same car that he saw earlier at the toll plaza) entering the compound of the rest house. The car was driven by Susyaimee, that is, the male Malay who had earlier conducted a body search on him. Seated in front next to Susyaimee in the car was Mat Nor. PW12 said in evidence that there was another car following the car driven by Susyaimee into the rest house compound, and this other car was a Proton Wira

Aeroback bearing registration number KAQ 9065, driven by another male Malay by the name (as PW12 subsequently came to know) of Hassan. The accused told PW12 not to be frightened or apprehensive by the presence of these three persons as they were his 'riders'.

PW12 said in evidence that the accused then asked him to go to the boot of car AW 163. The accused opened the boot and in the boot PW12 saw two blue sling bags. The accused opened the zips of the bags and showed PW12 the drugs. The accused said to PW12:

> Ini barang kau. Tak macam orang lain punya. Macam mana sekarang?

As to what follows next, this is what PW12 told the court:

> Saya memberitahu tertuduh yang dia terpaksa ikut saya ke tempat yang lain untuk membuat transaksi, ia itu, di luar dari kawasan rumah rehat Tanjong Malim. Masa itu juga saya nampak lelaki yang bernama Mat Nor bersama lelaki bernama Hassan telah memasuki kereta Proton Wira Aeroback KAQ 9065, dan menuju keluar dari kawasan rumah rehat, manakala lelaki Melayu bernama Susyaimee masih lagi berlegar-legar di kawasan rumah rehat. Selepas itu tertuduh bertanya kepada saya di manakah saya ingin buat transaksi tersebut. Saya beritahu tertuduh transaksi itu akan dilakukan di jalan lama Ulu Bernam, ia itu, apabila keluar daripada rumah rehat harus belok ke kiri. Selepas itu tertuduh masuk ke dalam kereta AW 163. Pada waktu yang sama saya telah menuju ke kereta saya dan beritahu Badrim supaya alertkan Tuan Yunus mengatakan bahawa bekalan dadah di dalam perjalanan. Masa itu juga saya nampak tertuduh memandu keluar kereta AW 163 dari kawasan rumah rehat. Saya terus menuju ke tertuduh dan memberitahunya belok ke kiri. Selepas itu saya terus lari ke kereta saya dan memandu keluar mengekori kereta tertuduh. Dan saya juga belok ke kiri.
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> Di jalan lama Ulu Bernam itu, ada sebuah stesen minyak Shell. Lebih kurang 50 meter sebelum stesen Shell itu, tertuduh telah berhenti kereta. Saya telah rapatkan kereta saya dengan kereta tertuduh. Saya rapatkan kereta ke sebelah kereta tertuduh, ke bahagian tepi kereta tertuduh. Selepas itu saya memberitahu tertuduh untuk belok masuk ke dalam stesen minyak Shell tersebut. Tertuduh yang masih lagi di atas jalan raya telah terus bergerak. Saya telah memberitahu Badrim, yang bersama saya di dalam kereta, untuk alertkan Tuan Yunus, bersedia untuk 'strike' di stesen minyak Shell. Apabila saya nampak tertuduh belok dan

masuk ke dalam kawasan Shell, pada waktu yang sama Badrim masih lagi berkomunikasi dengan Tuan Yunus. Saya menyebut perkataan:

Polis Strike!

Sebanyak dua kali, dan saya dengar Badrim memberitahu Tuan Yunus, melalui handset:

Polis Strike! Polis Strike!

Saya memandu kereta saya bersama-sama dengan Badrim terus menghala ke plaza toll Tanjong Malim. Saya tidak lihat bagaimana tertuduh ditangkap.

DPP: Bagaimana kamu tahu yang di kawasan itu ada 'strike team'?

PW12: Sebab semasa saya berada di kawasan rumah rehat di Ulu Bernam, selepas saya membuat beberapa panggilan telefon kepada tertuduh, Tuan Yunus memberitahu saya supaya jangan takut sebab kita ada 'strike team' untuk standby di sekitar kawasan Tanjong Malim dan setiap pergerakan saya diawasi oleh 'surveillance team' dari Bukit Aman, yang juga berada di sekitar kawasan Tanjong Malim pada masa itu.

Mat Nor, Susyaimee dan Hassan tidak main apa-apa peranan di dalam transaksi itu selain dari apa yang saya telah ceritakan kepada Mahkamah semalam.

DPP: Semalam kamu telah beri keterangan bahawa tertuduh telah ada beritahu kamu supaya jangan takut sebab ini semua adalah rider-rider tertuduh. Apa maksud kamu dengan 'ini semua adalah rider-rider tertuduh'?

PW12: Maksud saya dengan perkataan 'rider-rider' itu adalah orang susulan dan pembawa dadah atau courier untuk tertuduh. Tertuduh yang menggunakan perkataan 'rider-rider'. Tertuduh yang menggunakan perkataan 'ini semua'. Dengan perkataan 'ini semua' saya faham tertuduh bermaksud Hassan, Mat Nor dan Susyaimee.

The next important witness called by the prosecution was D/Cpl Yusoff bin Shariff (PW13) of the Narcotics Department, Bukit Aman, Kuala Lumpur. He testified that on 5 May 1998 at about 12 noon he attended a briefing conducted by DSP Mohammad. Present at that briefing were himself (PW13) and three other police officers. At the briefing DSP Mohammad informed them that an operation was to be carried out in the town of Tanjong Malim

involving two police undercover, namely, PW12 and Badrim, who would be pretending to be drug traffickers. PW13 and the other three officers were to form the surveillance team headed by one DSP Mohammad.

Dressed as a civilian, PW13 arrived in Tanjong Malim on a motorcycle at about 3pm on the same day (5 May). He drove around and familiarized himself as to the town area first; and at 4pm. PW13 arrived at the compound of the rest house. PW13 then left the compound to position himself at a spot not far away from the rest house and kept an observation on the rest house. The spot that he chose for the purpose of the observation was in front of a corner shop-house from where he had a clear view of the front part of the rest house. At about 5.15pm he saw a car AW 163 driven by the accused with two other passengers (who were male Malays) in it entering the compound of the rest house. On arriving at the rest house, all three of them alighted from the car and went up into the rest house. (The rest house was an old semi-wooden colonial style bungalow house built on concrete stilts located right in the heart of the town of Tanjong Malim). At about 6.15pm. PW13 saw all three of them got back into the same car (AW 163) and drove out of the compound of the rest house. The accused, again, was the driver.

At about 7pm the same car re-entered the compound of the rest house. This time the driver of the car was not the accused but one of the two male Malays who were with the accused earlier on. The accused got out of the car, and the car again left the rest house. About 5 minutes later PW12's car (BDE 5318), with Badrim in it, entered the compound of the rest house.

PW13's narration of what happened next was somewhat different from that of PW12's as set out earlier. For, according to PW13, both Omar and Badrim got out of their car, and Badrim proceeded to sit on a stone/concrete bench. Omar just stood by, by the side of the car. They were not seen to be talking to one another. The accused was seen standing some 20 meters away from Omar.

It is the further evidence of PW13 that at about 7.15pm he saw a car with registration number KAQ 9065 entering the rest house compound, and following this car was the Proton Saga AW 163. PW13 said he saw two male Malays came out from car AW163;

A and one male Malay came out from car KAQ 9065. The two male Malays who alighted from car AW 163 were the same two male Malays that came earlier together with the accused in car AW 163. As to the male Malay that came in car KAQ 9065, he had not seen him before. He saw the accused and PW12 approached B the car AW 163. The accused was seen opening the driver's door and pulling the lever that was beneath the driver's seat so as to open the boot. The accused was seen opening the car boot and showing PW12 something in it. Then the accused closed the boot and was seen talking to PW13. About 5 to 10 minutes later, the C same two male Malays who had earlier came in car AW 163 were seen leaving the compound of the rest house, but this time they used car KAQ 9065 instead. After car KAQ 9065 had left, the accused was seen getting into car AW 163 and leaving the rest house compound. Car AW 163 was followed by car BDE 5318.

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According to PW13 at about 7.40pm he was informed through the walkie talkie that the accused had been arrested by the strike team. Having been so informed he then left the area and headed back for Kuala Lumpur.

E

Another witness called by the prosecution was Deputy Supt. Yunus Mohamad (PW14), of the Narcotics Department, Bukit Aman, Kuala Lumpur, who headed and coordinated the 5th of May operation. He confirmed of being briefed from time to time by PW12 of the communications PW12 had with the accused and F of giving instructions to PW12; of having instructed Cpl. Badrim to accompany PW12 to Tanjong Malim to meet up with the accused and to bring the RM75,000 as a flash roll to dupe the accused into believing that PW12 was genuine about the intended drug transaction; of setting up the surveillance team (headed by G DSP Mohammad) and the strike team (headed by ASP Abdul Rahim Shariff) for the purpose of the operation involving PW12; and of being present in and about the town of Tanjong Malim on the day of the operation and constantly in communication and giving instructions and directions to the police officers involved in H the operation, in particular, PW12 (Cpl. Omar), Badrim, PW13 (Cpl. Yusoff) and ASP Abdul Rahim.

According to PW14, when Badrim informed him by walkie talkie:

I Boleh strike!

he immediately instructed ASP Abdul Rahim to intercept and detain the accused's car (AW 163), and to arrest the accused. He also instructed the arrest of Mat Nor, Susyaimee and Hassan. After the arrests, he met all the four arrested persons, namely:

(1) the accused;

(2) Mat Nor;

(3) Susyaimee; and

(4) Hassan,

at the Ulu Bernam Police Station. He met all four of them at the police station on the same day of the arrest, at about 8-9pm.

PW14 said in evidence that he directed that Mat Nor, Susyaimee and Hassan be investigated under the s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter shall be referred to as the 'Special Preventive Measures Act'); and that they be handed over to the Narcotics Department of the State of Perak. According to PW14, he directed that Mat Nor, Susyaimee and Hassan be investigated under s. 3(1) of the Special Preventive Measures Act because 'they were not in possession of any drugs'. In his own words, he said:

> Tujuan saya menghantar mereka (Mohd Noor, Susyaimee dan Hassan) ke Jabatan Narkotik, IPK Perak ialah kerana mereka ditangkap do bawah seksyen 3(1) Akta Dadah Berbahaya (LLPK) 1985. Semasa mereka ditangkap pada malam itu, mereka tiada memiliki sebarang jenis dadah. Ini sebabnya mereka ditangkap di bawah seksyen 3(1). Tujuan siasatan ini adalah untuk tindakan di bawah Akta; untuk mereka disiasat dan ditahan di bawah Akta tersebut.

In the present case, there are two investigation officers, namely:

(1) ASP Gan Song Hoo (PW16); and

(2) ASP Tey Kong Seng (PW15).

ASP Gan was the first investigating officer until he was transferred to IPK Kedah on 1 January 2000. His transfer to Kedah took place about one and a half years after the Tanjong Malim operation. This means that for the present case he (PW16) was the substantive investigating officer. Then, with effect from 1

A January 2000, ASP Tey took over the task of investigating officer. As the operation and arrests occurred in May 1998, this means the involvement of PW15 in the investigation was at a much later stage.

B It is the evidence of PW16 that, although he was the substantive investigation officer, he had never seen or met Mat Nor, Susyaimee and Hassan. He said in evidence:

> Saya tidak pernah melihat ketiga-tiga penama ini.

C He said he only saw the accused. It is his evidence that on the very next day after the arrests of Mat Nor, Susyaimee and Hassan on 5 May, that is to say, on 6 May 1998, he was already been given to understand by ASP Rahim Sharif (acting under the instruction of PW14) that the arrests of these three persons were D under the Special Preventive Measures Act. Thus, he merely investigated the accused, and not the other three; and he investigated the accused on offence of drug trafficking under s. 39B of the DDA. He did not investigate the other three persons at all (and, as pointed out earlier, neither did he meet E them: for they were sent to the Narcotics Department of Perak very soon after their arrests). He added, however, that he did, nevertheless, instruct three police officers to record, separately, a statement from each of the three persons pursuant to s. 112 of the Criminal Procedure Code ('the CPC').

F

It is the evidence of PW16 that when he subsequently forwarded the investigation papers and his recommendations to his superior officer for the purpose of prosecution, he was only concerned with the accused. He recommended that the accused be charged for G an offence under s. 39B of the DDA (trafficking in cannabis). As for Mat Nor, Susyaimee and Hassan, he said he did not make any recommendation. His recommendation was silent on them.

At the trial before me in the present case, Mat Nor, Susyaimee and Hassan were not called as witnesses for the prosecution; nor H were they offered to the defence. The reason offered by the prosecution for not calling or offering them was that they could not be traced. Be that as it may, the prosecution, nevertheless, attempted to tender their s. 112 statements (ID40, ID41 and ID42) as documentary evidence for the prosecution pursuant to I s. 32(i) and (j) of the Evidence Act 1950 in order to strengthen the prosecution case. Section 32 of the Evidence Act provides:

32. Cases in which statement of relevant fact by persons who is dead or cannot be found, etc., is relevant.

(1) Statements, written or verbal, of relevant facts made by a person ...who cannot be found ... or whose attendance cannot be procured without an amount of delay or expenses which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

...

(i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law, and

(j) where the statement was made by a public officer in the discharge of his duties.

Following objections by the defence, I had ruled the statements to be inadmissible. The onus is on the prosecution to satisfy the court that the requirements of s. 32 are satisfied, that is to say, the three persons concerned could not be found or that under the circumstances their attendance could not be procured without an unreasonable amount of delay or expenses. The prosecution failed to satisfy me that they have fulfilled these requirements. I was not satisfied on the evidence that there were serious and reasonable efforts by the prosecution to secure the attendance of the said three persons for the purpose of the trial. On the evidence, persons such as Mat Nor, Susyaimee and Hassan, once they ceased to be under arrest or detention, were likely to abscond. Yet, remarkably no efforts were made at all by PW16 throughout the one year and six months prior to his transfer to Kedah, although he knew or ought to have known being a senior police officer that the trial of the accused was forthcoming, to ensure that the three persons would not abscond and also to ensure their attendance at the trial. PW16 in his evidence merely said-

Saya tidak ada melakukan apa-apa usaha untuk mengesan dan untuk mempastikan kehadiran mereka bertiga kerana saya telah ditukarkan ke IPK Kedah pada Januari 2000.

There were, however, efforts made subsequently in the later part of the year 2001 and thereafter to trace these three persons by PW16's successor (as investigating officer), that is, PW15, but the efforts were too late and rather lip service in nature, and, in any case, unsuccessful.

Another witness called by the prosecution was the wife of the accused, Puan Kamarlia binti Said (PW3), who was the registered owner of the Proton Saga car AW 163. She identified the car AW 163 as being hers. She told the Court that ever since she bought the car, it was the accused, her husband, who had been using it.

At the close of the case for the prosecution, the learned defence counsel, Encik Rusli Zain, submitted that the prosecution had failed to establish a *prima facie* case. Encik Rusli argued that there were discrepancies in the evidence of the prosecution witnesses, in particular, PW9, PW12 and PW13. Moreover, there is no evidence that any drug transaction ever took place between the accused and PW12 at the Hulu Bernam road (as alleged in the charge), or even at the rest house.

The learned counsel submitted that, for the purpose of determining as to whether or not a *prima facie* case had been established, the Court must embark into a maximum evaluation of the evidence adduced by the prosecution. The learned counsel referred to the case of *Looi Kow Chai v. PP* [2003] 1 CLJ 734. In this case cited, Gopal Sri Ram JCA, in giving the judgment of the Court of Appeal said (at p. 752):

> We are confident in the view we have just expressed because we find nothing in the amended s. 180(1) of the Criminal Procedure Code that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s. 180 when an accused elects to remain silent as happened in *Pavone v. Public Prosecutor* [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s. 180 that requires a judge sitting alone first to make a minimal evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.
>
> It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

The learned defence counsel further referred to the Federal Court case of *Balachandran a/l Selvaratnam v. Public Prosecutor* [2005] 1 CLJ 85 where Augustine Paul JCA (as he then was), delivering the judgment of the Federal Court, said:

> A *prima facie* case is therefore one that is sufficient for the accused to be called to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase *'prima facie'* is defined in similar terms in *Mozley and Whitley's Law Dictionary* 11th Ed as:
>
> > A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the Court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the Court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the Court make a determination for the purpose of section 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the Court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

A As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond
B reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond
C reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by section 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-
D evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

E It is important to observe from the above passage that the Federal Court, besides enunciating the maximum evaluation principle, also enunciates the related 'principle of automatic conviction', meaning that where an accused, at the conclusion of the prosecution case, elects to remain silent and not to call
F evidence, after a finding of *prima facie* case has been made against him by the court, he shall straight away be convicted by the court without further ado: the court will not re-evaluate the evidence that has been presented by the prosecution. Thus, without doubt, the above judgment of the Federal Court is a clear
G rejection of the principle of minimal evaluation as propounded by the landmark (Privy Council) case of *Haw Tua Tau v. PP* [1981] 3 All ER 14; and, equally, without doubt, the above judgment revives principles which for the sake of convenience I shall refer to as the twin principles of maximum evaluation and provisional
H beyond reasonable doubt as enunciated by *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597, the very principles which had been abrogated by the Criminal Procedure (Amendment) Act 1997.

I

The learned Deputy Public Prosecutor, Encik Yusof bin Mohd Ishak, on the other hand, urged this court not to follow Looi Kow Chai and Balachandran on the grounds that the judgments in these two cases, by enunciating the principles of maximum evaluation and provisional beyond reasonable doubt, are giving the words '*prima facie* case' in s. 180 of the CPC a meaning that is contrary to the intention of Parliament which, when making the amendment to s. 180 of the CPC in 1997, had the intention of restoring the minimal evaluation principle as enunciated by the Privy Council in the landmark case of *Haw Tua Tau*, and nullifying the effect of the Federal Court judgment in *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597, which enunciated the maximum evaluation principle. The learned DPP referred to the Explanatory Statement to the Bill of the Criminal Procedure (Amendment) Act 1997.

The learned DPP further submitted that the correct principle to follow in determining whether or not a *prima facie* had been made out is the minimal evaluation principle as enunciated by the Privy Council in *Haw Tua Tau v. Public Prosecutor* [1981] 3 All ER 14, as to do so would be in line with the intention of Parliament; and Encik Ishak further argued that, applying that principle to the present case, the prosecution had succeeded in establishing against the accused a *prima facie* case of trafficking in 44,023.3 grams of cannabis at the time, date and place as specified in the charge. The learned DPP referred to the definition of 'trafficking' in s. 2 of the DDA, which includes 'selling' and submitted that the evidence showed that the accused had committed the act of selling the cannabis to PW12 at the Hulu Bernam road on the specified date and at the specified time as mentioned in the charge. The learned DPP in his lengthy written submission, however, made it clear – and this is very pertinent - that he was not relying on any legal presumption as provided for in the DDA. I shall quote the relevant part of his written submission:

> The prosecution is not relying on any of the presumptions available under the DDA as this is a direct case of trafficking.

With the greatest respect and in all humility I am in full agreement with the learned DPP on the intention of Parliament when enacting the Criminal Procedure (Amendment) Act 1997, and that the judgment of the Court of Appeal in Looi Kow Chai and the

judgment of the Federal Court in Balachandran on the meaning of the words '*prima facie* case' as found in s. 180 of the CPC are contrary to the intention of Parliament.

The facts of the case of *Haw Tua Tau* are briefly set out by the Hon. Mr. Justice Rubin of Singapore in his illuminating article entitled *Standard of Proof Relating to Sufficiency of Evidence of Evidence at Criminal Trial: Mental Gymnastics Since Haw Tua Tau* [1996] 2 CLJ lxiv (Reproduced by the CLJ by kind permission of the Singapore Law Review). They are as follows:

> *Haw Tua Tau* was a hawker, charged with having caused the death of two other hawkers, a mother and son, in circumstances amounting to murder on 12 December 1976. The accused operated a food stall (No. 538) at the Margaret Drives Hawkers' Center and both the deceased operated a nearby food stall (No. 506) in the same centre. Petty quarrelling often resulted between them over the cleaning of tables. On that fateful day, the stall holders of No. 506 failed to properly clean a table. The accused walked to stall 506 with a bearing scrapper wrapped in paper, and thrust it into the chest of the son, Phoon Ah Leong. Phoon's mother, Hu Yuen Kheng, upon seeing the incident, became involved in a struggle with the accused. She was also fatally stabbed in the chest.
>
> The assailant who fled from the scene was eventually apprehended and charged in Court on 13 December 1976 on two counts of murder. At first instance, Haw was defended by the late Mr. Khosa. The accused's defence was that he did not intend to kill, that he had acted under extreme provocation and the fatal injuries resulted from a sudden fight. No procedural or constitutional issues surfaced at the trial. In view of the overwhelming evidence which disclosed that Haw Tua Tau had intentionally and deliberately inflicted the fatal injuries on the two unarmed persons coupled with the fact there were two eyewitnesses to the brutal killings, the trial Court rejected his evidence and sentenced him to suffer death.

In *Haw Tua Tau* (a case involving the interpretation of s. 188 of the Singapore's Criminal Procedure Code which is in *pari materia* with s. 180 of our CPC prior to the Criminal Procedure (Amendment) Act 1997) the principle of minimal evaluation is expressed in the following terms by Lord Diplock who delivered the judgment of the Privy Council (at p. 19):

Section 188(1) states the conditions precedent to the right and duty of the judge of trial to call on the accused to enter on his defence. It takes the form of a double negative: if the court does not find that no case against the accused has been made out which, if unrebutted, would warrant his conviction. For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place on the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under the system to require the court to do so.

The crucial words in s. 188(1) are the words 'if unrebutted', which make the question that the court has to ask itself a pure hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words 'if unrebutted' refer. What they mean is that for the purpose of reaching the decision called for by s. 188(1) the court must act on the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true, and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided; questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, if it were to be accepted by the jury as accurate, would establish each essential

element in the alleged offence, for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one of more of those essential elements, it is the judge's duty to direct an acquittal, for it is only on evidence that juries are entitled to convict; but, if there is some evidence, the judge must let the case go on. It is not the function of the jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect would be a conditional verdict of guilty before the accused had any opportunity of putting before them any evidence in his defence. On the question of the accuracy of the evidence of any witness jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is **some** evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction', within the meaning of s. 188(1). Where he has not so found, he must call on the accused to enter on his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance. (emphasis added.)

A clear understanding of the two basic principles, namely: A

(a) the minimum evaluation principle; and

(b) the maximum evaluation principle,

is very important. The essence of the minimal evaluation principle B is that the judge (in determining as to whether or not a *prima facie* case has been made out) is only required to consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. The judge should keep an open mind about C the veracity and accuracy of recollection of any individual witness.

It is also to be noted that there is this further aspect of the minimal evaluation principle, which is: where a judge finds that there is a *prima facie* case (having applied the minimal evaluation D principle) and calls for the defence, and the accused elects to remain silent and to call no evidence, the judge must not automatically record a conviction (whereas according to Balachandran which advocates the maximum evaluation principle, conviction is a must, is automatic, in such a situation). For, in E such a situation, it is incumbent upon the judge to re-evaluate the prosecution case as a whole to determine as to whether or not ultimately the prosecution has proved its case beyond reasonable doubt.

I shall explain the principle of maximum evaluation in due course. F

I am in agreement with the views of Mr. Justice Rubin in the article referred to earlier that the above pronouncements of Lord Diplock on the minimal evaluation principle are in consonance with the principles of fair hearing. They are in fact an amplification of a G practice direction issued in 1962 by Lord Parker CJ (see *Practice Note* [1962] 1 All ER 448), providing certain guidelines to the Justices and Magistrates in England, in the following terms:

> A submission that there is no case to answer may properly be H made and upheld:
>
> (a) when there has been no evidence to prove an essential element in the alleged offence;
>
> (b) when the evidence adduced by the prosecution has been so I discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

A

> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it.

B

The *Haw Tua Tau* principle (or the minimal evaluation principle) was dutifully followed by Edgar Joseph J (as he then was) in *Pavone v. Public Prosecutor* [1984] 1 MLJ 77 where the learned Judge said (at p. 79):

> Now, the sole question at the close of the case for the
C prosecution is whether or not a *prima facie* case has been made out, that is to say, whether there is some evidence (not inherently incredible) which, if believed, establishes the essential elements of the offence charged. If there is such evidence, then the defence must be called but care must be taken to leave suspended the
D question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence. This applies even where, as here, the defence elects to remain silent and calls no evidence. Consequently, in a proper case, there is nothing illegal in a Magistrate or a President, or a Judge sitting alone or with Assessors, calling for the defence upon *prima facie* evidence being
E adduced and then proceeding to acquit and discharge even when the accused elects to remain silent and to call no evidence if not satisfied that the charge has been established by the prosecution beyond all reasonable doubt.

F

Haw Tua Tau was also followed in several Malaysian Federal Court/Supreme Court cases such as:

(1) *Ragunathan v. PP* [1982] CLJ 25; [1982] CLJ (Rep) 63;

(2) *Munusamy v. PP* [1987] 1 MLJ 492;

G

(3) *Junaidi bin Abdullah* [1993] 4 CLJ 201; and

(4) *Tan Book Kean v. PP* [1995] 3 MLJ.

In *Ragunathan* Raja Azlan Shah Ag. LP (as His Royal Highness
H then was) expressed the *Haw Tua Tau* principle in the following terms:

> Applying that principle, the learned magistrate at the close of the prosecution case had to determine as a question of law whether on the evidence as adduced and unrebutted, the appellant could
I lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its

> existence to be reasonably inferred. That is the question raised in the appeal. It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the court, as a tribunal of fact that the applicant is guilty as charged.

For the sake of completeness it must be pointed out that the application of the minimal evaluation principle by the courts in Malaysia was nothing new. Even before the Privy Council ruling in *Haw Tua Tau* in 1981 the principle of minimal evaluation had been applied by our courts. For example in *Public Prosecutor v. Omar Lopez* [1967] 2 MLJ 281 Williams J of the Kuching High Court held:

> I think however that the position becomes much clearer as to what is meant by 'no case to answer' when one looks at a trial which involves the use of a jury. For a Judge at the close of the case for the prosecution in such instance to say that the prosecution has proved the guilt of the accused beyond reasonable doubt would be tantamount to his being enabled to say that the jury must in law find the person guilty and so make him decide the case. That cannot be the law …
>
> The position then is that at the close of the prosecution upon submission being made a Magistrate must ask himself not whether he is satisfied that the prosecution has proved the case beyond reasonable doubt but whether there is evidence which if believed by reasonable men – it follows that it must be capable of such belief – would justify such men in convicting the accused of the offence charged. If he comes to the conclusion that there is no such evidence then he may acquit. If, however, he considers that such evidence does exist he should rule that there is a case to answer. It is then a matter for the accused, or his counsel, to decide what to do. He may say nothing and rest upon the submission, or he may make an unsworn statement, or give evidence on oath and call witnesses in the normal way. In any of the above events it will then fall to the Magistrate to consider the total of the evidence that is then before him and applying the normal test that is applied in a criminal prosecution decide to his own satisfaction the guilt of the accused.

In 1973, in *Tan Ah Ting v. Public Prosecutor* [1974] MLJ 37, as a magistrate of Kuala Lumpur hearing a traffic offence case at Court Hill, adopting the 1962 practice direction issued by Lord Parker CJ mentioned earlier, I applied the minimal evaluation principle, in deciding as to whether or not the accused ought to be called to enter his defence. I ruled:

> In order for the court to call for the defence, the court need not satisfy itself that the prosecution had proved its case beyond reasonable doubt. The court has to direct its mind to the question as to whether the prosecution had proved its case beyond reasonable doubt, only for the purpose of conviction. In order to call for the defence the court has only to consider whether the prosecution had made out a prima facie case.

Unfortunately, on appeal, the High Court Judge did not share my view. Wan Sulaiman FJ sitting as a High Court Judge held:

> The learned magistrate was correct in holding that before calling upon the defendant to make his defence, the court had only to be satisfied that the prosecution has made out a *prima facie* case. However, I am left in doubt whether, in holding that prosecution had made out a *prima facie* case, he had …, indeed determined, in the word's of *Soo Sing*'s case [[1951] MLJ 143] 'whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt.'.

The *Haw Tua Tau* principle as enunciated by Lord Diplock's judgment in the Privy Council was also adopted by courts of other jurisdictions for example:

(a) in Singapore, by the Singapore Court of Appeal in *Roseli bin Amat* [1989] 2 MLJ 65; *Ng Theng Shuang v. PP* [1995] 2 SLR 36; *Sim Ah Cheoh v. PP* [1991] 2 MLJ 353; *PP v. Gan Lim Soon* [1993] 3 SLR 261; and *PP v. Wong Wai Hung* [1993] 1 SLR 927;

(b) in Brunei, by the Brunei Court of Criminal Appeal case of *Yeo Tse Soon v. PP* [1995] 2 CLJ 179; and

(c) in New Zealand, in *Auckland City Council v. Brailey* [1988] 1 NZLR 103.

In *Yeo Tse Soon* the Brunei Court of Appeal expounded the minimal evaluation principle in very clear terms, and it is as follows:

> Once the prosecution has adduced evidence which reveals all the elements of the offence and which is not so completely discredited that no reasonable tribunal of fact could believe it, a case has been made out which if unrebutted would warrant a conviction. It is immaterial that the judge or magistrate may have doubts as to its credibility: the time is not appropriate for him to decide whether

> it is credible or not, subject only to the reservation that he must be satisfied that it could be believed – which is a question not of fact but of law. That being so, there is no justification for distinguishing between the procedure to be followed in a trail by jury and a trial by judge alone.

Even prior to *Haw Tua Tau* the minimal evaluation principle had already been adopted in England in *R v. Galbraith* [1981] 1 WLR 1039 and in Australia in *May v. Sullivan* [1954-55] 92 CLR 654.

In *May v. Sullivan* the Full High Court of Australia ruled:

> When at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact ... A magistrate who has decided that there is a 'case to answer' may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made 'a *prima facie* case' but it does not follow that in the absence of a 'satisfactory answer' the defendant should be convicted ...

However, subsequently, in *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151 and *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 the Federal Court decided to discard the minimal evaluation principle as enunciated by *Haw Tua Tau* and to overrule *Ragunathan, Munusamy, Junaidi, Tan Boon Kean* and *Pavone*. Instead, the Federal Court enunciated the maximum evaluation principle. One of the judges of the majority decision, Edgar Joseph Jr FCJ (who, earlier, had followed *Haw Tua Tau* in *Pavone*), explained the principle in the following terms:

> Furthermore, if the onus on the prosecution at the close of its case, is to establish a 'mere *prima facie* case', the test to be applied is a minimal evaluation of the prosecution's evidence to ensure that it is not inherently incredible (see *Haw Tua Tau v. PP*). Whereas, if the onus on the prosecution at the close of its

A case, is to establish a case 'beyond reasonable doubt', then the test to be applied to the prosecution's evidence is a maximum evaluation of the prosecution's evidence, which calls for 'a more rigorous test of credibility' (per Lord Diplock in *Haw Tua Tau* at p. 54G), in order to answer the question: if there is no more
B evidence, has the prosecution proved its case beyond all reasonable doubt? (See *PP v. Fong Ah Tong & Anor* [1940] MLJ 240). (emphasis added.)

The essence of the maximum evaluation principle (which goes hand in hand with the principle of provisional beyond reasonable
C doubt) as advocated by *Arulpragasan* and *Khoo Hi Chiang* is this. The maximum evaluation principle imposes upon the court, at the close of the case for the prosecution, the duty to thoroughly scrutinize the prosecution evidence, including a rigorous assessment of the accuracy and credibility of the prosecution witnesses, and
D to make a determination as to whether or not the prosecution has provisionally (the word 'provisionally' is not used by the majority judgment in *Arulpragasan*: but I am deliberately using the word 'provisionally' here for the sake of clarity as the finding of the court at this stage has to be provisional since the defence has yet
E to be called and heard) proven its case beyond reasonable doubt, before calling the accused to enter his defence. If the prosecution, at the close of the case for the prosecution, fails to provisionally prove its case beyond reasonable doubt, then, the court must acquit the accused. On the other hand, if the court after having
F made a maximum evaluation of the prosecution evidence is of the view that the prosecution has provisionally proved its case beyond reasonable doubt, and the accused when called upon to enter his defence, elects to remain silent and to call no evidence, the court shall automatically record a conviction. The court will not invite
G his counsel to resubmit on whether or not there is a case to answer; nor will the court re-evaluate the prosecution evidence that has been adduced up to the conclusion of the prosecution case.

H The Singapore Court of Appeal in *Ng Theng Shuang* and the Brunei Court of Criminal Appeal in *Yeo Tse Soon* (both decided before *Arulpragasan*) had declined to follow *Khoo Hi Chiang*.

In *Ng Then Shuang v. Public Prosecutor* the Singapore Court of
I Appeal held:

> We were not persuaded … that the minimal evaluation of the evidence at the close of the prosecution's case as propounded by *Haw Tua Tau* and consistently followed in Singapore since then was not the proper test applicable to the provisions of section 189(1) of the Criminal Procedure Code. Accordingly, on such an evaluation of the evidence a *prima facie* case was clearly made out against the appellant.

Following a controversy over the decision in *Arulpragasan*, Parliament intervened. Hence, the passing of the Criminal Procedure (Amendment) Act 1997 (Act A979 which came into force on 31 January 197) which introduced the new s. 180.

That the intention of Parliament was to nullify or abrogate the *Arulpragasan* principle (ie, the maximum evaluation principle) and to revive the minimal evaluation principle as enunciated in *Haw Tua Tau* is clearly explained:

(a) by the Explanatory Statement to the Criminal Procedure (Amendment) Bill which sought to amend s. 180 of the CPC; and also

(b) by the speech in Parliament of the Honourable Minister in the Prime Minister's Department, Dato' Abang Abu Bakar, responsible for judicial affairs when moving the Bill in the House of Representatives (Dewan Rakyat) for the second reading on 17 December 1996, as reported in the *Hansard*.

I shall set out the Explanatory Statement to the Criminal Procedure (Amendment) Bill. It is as follows:

> This Bill seeks to amend the Criminal Procedure Code (the 'Code') as a consequence of the decision of the Federal Court in July 1996 in the case of Arulpragasan a/l Sandaraju dan Pendakwa Raya ('*Arulpragasan*'s case').
>
> 2. Clause 2 seeks to amend section 173 which deals with summary trial in the subordinate courts.
>
> Amendments are proposed to paragraph (f) of section 173 of the Code to make it clear that at the close of the prosecution's case, what the court has to consider is whether or not the prosecution has made out a *prima facie* case against the accused person. This approach is consistent with the approach taken by the courts in several other Commonwealth countries. In Malaysia, particularly since the decision of the Privy Council in the case of *Haw Tua*

Tau v. Public Prosecutor in 1981, this has also been the approach taken by the Supreme Court and the Federal Court (except in the case of *Khoo Hi Chiang v. Public Prosecutor* in 1993) prior to *Arulpragasan*'s case.

The amendments proposed to paragraph (m) of section 173 of the Code provides that it is only at the conclusion of the whole case that the Court must consider all the evidence adduced before it (including the evidence adduced by the accused in his defence) and determine whether the prosecution has proved its case beyond reasonable doubt.

3. Clause 4 of the Bill seeks to amend section 180 of the Code to achieve the same purpose as that sought to be achieved by the amendments to paragraph (f) of section 173 of the Code.

4. Clause 6 seeks to introduce a new section 182A into the Code to provide for the same matters as are in the proposed amendments to paragraph (m) of section 173 of the Code.

And I shall also set out extensively the Minister's speech in the Dewan Rakyat, which is as follows:

Menteri di Jabatan Perdana Menteri (Dato' Abang Abu Bakar bin Datu Bandar Abang Haji Mustapha): Tuan Yang di-Pertua, saya memohon mencadangkan supaya suatu Rang Undang-undang bernama suatu akta untuk meminda Kanun Prosedur Jenayah dibacakan kali yang kedua sekarang.

Tuan Yang di-Pertua, pada 27hb Julai, 1996 yang lalu, Mahkamah Persekutuan Malaysia dalam kes *Arulpragasan a/l Sundaraju* dan Pendakwaraya telah memutuskan dengan majoriti 4-3 bahawa standard pembuktian yang diperlukan pada penutup kes pendakwaan bagi mewajarkan mahkamah memanggil orang tertuduh untuk membela dirinya ialah pembuktian kes "melepasi keraguan yang munasabah," atau dengan izin, "beyond reasonable doubt." Itulah tafsiran Mahkamah Persekutuan bagi peruntukan dalam Seksyen 180, Kanun Prosedur Jenayah bagi perbicaraan di Mahkamah Tinggi yang mengatakan bahawa, dengan izin, "The Court, if it finds that no case against the accused have been made out which if unrebutted, would warrant his conviction shall record an order of acquittal". Ungkapan yang sama terdapat dalam perenggan (f), Seksyen 173 Kanun itu, bagi perbicaraan di Mahkamah Rendah.

Kes *Arulpragasan* ini telah mengubah standard pembuktian pada penutup kes pendakwaan seperti mana yang diputuskan dalam kes-kes di Malaysia berikutan dengan keputusan Privy Council dalam kes *Haw Tua Tau* pada 22hb. Jun, 1981. Dalam kes itu Privy Council membincangkan Seksyen 188 (1), Kanun Prosedur Jenayah Singapura yang sama peruntukannya dengan Seksyen 180, Kanun Prosedur Jenayah Malaysia. Privy Council memutuskan bahawa, dengan izin, "at the conclusion of the prosecution's case, what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if you were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence … is lacking, then and only then is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction," within the meaning of Section 188(1). Where he has not so found, he must call upon the accused to enter for his defence and as decider of fact must keep an open mind as to the accuracy of any of the prosecution witnesses until the defence has tendered such evidence, if any, by the accused or other witness as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

Antara kes yang diputuskan oleh Mahkamah Agung dan Mahkamah Persekutuan di Malaysia yang mengikuti keputusan dalam kes *Haw Tua Tau* ini ialah kes *Ragunathan v. Pendakwaraya* sebagaimana yang dilaporkan dalam tahun 1982 (1 MLJ – 139), kes *Munusamy v. Public Prosecutor* yang diputuskan dalam tahun 1987 dan kes *Junaidi bin Abdullah v. Public Prosecutor* yang diputuskan dalam tahun 1983.

Menteri di Jabatan Perdana Menteri (Dato' Abang Abu Bakar bin Datu Bandar Abang Haji Mustapha): Tuan Yang di-Pertua, walau bagaimanapun, pada 24hb. Disember 1993, dalam kes *Khoo Hi Chiang v. Public Prosecutor*, Mahkamah Agung Malaysia telah memutuskan untuk tidak mengikut keputusan Privy Council dalam kes *Haw Tua Tau* dan kes *Ragunathan, Munusamy* dan *Junaidi*. Sebaliknya, ia telah memutuskan bahawa apabila pihak pendakwa menutup kesnya, mahkamah hendaklah membuat penilaian maksimum tentang keterangan yang dikemukakan oleh pihak pendakwa dan menentukan sama ada pihak pendakwa sudah membuktikan pertuduhan terhadap orang tertuduh itu hingga tiada apa-apa keraguan yang munasabah, dengan izin, "beyond all reasonable doubt". Ini adalah ujian yang sama seperti yang diputuskan oleh majoriti hakim dalam kes *Arulpragasan.*

A Namun demikian, pada 9hb. November 1995, dalam kes *Tan Boon Kean v. Public Prosecutor*, Mahkamah Persekutuan telah kembali mengikut keputusan dalam kes *Haw Tua Tau.* Sebagaimana yang dinyatakan tadi, kedudukan ini tidak lama kerana pada 27hb. Julai 1996, kes *Arulpragasan* telah diputuskan.

B Tuan Yang di-Pertua, kes *Haw Tua Tau* telah diikuti bukan sahaja di Malaysia tetapi juga di Singapura, di Brunei dan di New Zealand. Prinsip yang dinyatakan dalam kes itu juga telah dipakai di Australia.

C Di Singapura, Mahkamah Rayuannya enggan menggunakan standard, dengan izin, "beyond reasonable doubt" yang digunakan dalam kes *Khoo Hi Chiang* dan yang kemudiannya diikuti dalam kes *Arulpragasan.*

Kes *Khoo Hi Chiang* itu dibincangkan dengan panjang lebar dalam
D kes *Ng Then Shuang v. Public Prosecutor* yang diputuskan pada 4hb. Mac, 1995. Dalam kes itu Mahkamah Rayuan Singapura mengatakan bahawa, dengan izin:

> We were not persuaded … that the minimal evaluation of the evidence at the close of the prosecution's case as
E propounded by *Haw Tua Tau* and consistently followed in Singapore since then was not the proper test applicable to the provisions of section 189(1) of the Criminal Procedure Code. Accordingly, on such an evaluation of the evidence a *prima facie* case was clearly made out against the appellant.

F Mahkamah Rayuan Jenayah Brunei juga, dalam kes *Yeo Tse Soon v. Public Prosecutor*, telah membincangkan keputusan Mahkamah Agung Malaysia dalam kes *Khoo Hi Chiang* dengan panjang lebar, dan kemudiannya telah enggan mengikut keputusan itu.

G Mahkamah itu mengatakan, antara lain, bahawa Mahkamah Agung Malaysia, dengan izin:

> … emphasized that the legislation it was considering nowhere referred to "a *prima facie* case". That was true, but the words of the statue (which in this connexion were
H identical to those of the Brunei statute) were apt to describe a *prima facie* case.

Di New Zealand, Mahkamah Tingginya dalam kes *Auckland City Council v. Brailey* yang diputuskan pada 16hb. Julai, 1987, memutuskan bahawa pendekatan yang harus diambil oleh
I mahkamah pada penutup kes pihak pendakwaan ialah sebagaimana yang dinyatakan oleh Lord Diplock dalam kes *Haw Tua Tau.*

Di Australia pula, dalam kes *May v. Sullivan*, yang dipetik, tetapi tidak disetujui oleh Yang Arif Hakim Tan Sri Edgar Joseph Jr. dalam kes *Arulpragasan.*

High Court Australia yang mendengar rayuan daripada Supreme Court Australia Selatan dalam tahun 1995, telah menggunakan pendekan yang serupa seperti pendekatan dalam kes *Haw Tua Tau.*

Dalam kes *May v. Sullivan* itu mahkamah mengatakan bahawa, dengan izin:

> When at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact … A magistrate who has decided that there is a 'case to answer' may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made 'a *prima facie* case' but it does not follow that in the absence of a 'satisfactory answer' the defendant should be convicted.

Oleh yang demikian, adalah jelas bahawa, di negara-negara Komanwel yang berjiran dengan Malaysia, standard pembuktian kes pendakwaan, bagi mewajarkan mahkamah membuat keputusan untuk memanggil orang tertuduh membuat pembelaan ialah standard "*prima facie*", bukan standard "beyond reasonable doubt" seperti yang diputuskan dalam kes *Arulpragasan.*

Kerajaan berpendapat bahawa tidaklah wajar Malaysia mempunyai standard yang berbeza daripada standard yang terpakai di negara-negara Komanwel yang berjiran dengan Malaysia.

Tuan Yang di-Pertua, kes *Arulpragasan* membawa implikasi yang berbeza pada pihak pendakwa dan orang tertuduh.

Dari satu segi, standard, dengan izin "beyond reasonable doubt" pada akhir kes pendakwaan akan mewujudkan penilaian yang ketat pada peringkat itu dan akibatnya akan lebih mudahlah orang yang sebenarnya bersalah lepas daripada pertuduhan dan oleh itu lepas daripada hukuman. Jika ini berlaku keadilan tidak akan tercapai.

Dari segi yang lain pula, apabila mahkamah sudah membuat keputusan pada penutup kes pihak pendakwa bahawa pihak pendakwa sudah mengemukakan keterangan yang dapat membuktikan pertuduhan terhadap orang tertuduh sehingga tiada lagi keraguan yang munasabah, maka sukar untuk dibayangkan bagaimana orang tertuduh itu akan dapat membangkitkan keraguan yang munasabah bagi menyangkal kes yang sudah terbukti sedemikian.

Hasilnya ialah, apabila orang tertuduh dipanggil membela dirinya, besar kemungkinan apa-apa yang dikemukakannya dalam pembelaan tidak akan berjaya menimbulkan keraguan yang munasabah. Ini juga tidak akan menghasilkan keadilan.

Kerajaan berpendapat, wajarlah kepentingan masyarakat dan kepentingan mangsa sesuatu jenayah diseimbangkan dengan kepentingan orang tertuduh dengan memastikan bahawa standard pembuktian di peringkat penutup kes pendakwaan standard ialah standard *"prima facie"*.

Tuan Yang di-Pertua, pindaan yang utama yang dicadangkan melalui rang undang-undang ini ialah kepada seksyen 180 yang merupakan peruntukan yang dipertikaikan dalam kes *Arulpragasan*.

Peruntukan ini memperkatakan standard pembuktian pada penutup kes pendakwaan di Mahkamah Tinggi. Fasal yang berkenaan dalam Rang Undang-undang ini ialah fasal 4. Oleh sebab standard pembuktian pada penutup kes pendakwaan di Mahkamah Rendah adalah sama, maka perenggan 173(f) yang mengandungi peruntukan yang berkenaan juga perlu dipinda. Fasal yang berkenaan dalam Rang Undang-undang ini ialah fasal 2(c).

Selain itu, bagi memperjelaskan bahawa terdapat dua jenis standard pembuktian di dua peringkat dalam sesuatu perbicaraan kes jenayah di Mahkamah Tinggi, iaitu, standard *"prima facie"* pada penutup kes pendakwaan dan standard "beyond reasonable doubt" pada akhir keseluruhan kes, maka adalah dicadangkan, supaya suatu seksyen baru, iaitu seksyen 182A, dimasukkan ke dalam Kanun Prosedur Jenayah.

Cadangan ini terkandung dalam fasal 6 Rang Undang-undang ini.

With the greatest respect and in all humility, it is my considered view that the Court of Appeal and the Federal Court, respectively, in *Looi Kow Chai* and *Balachandran* should not have revived the maximum evaluation principle as enunciated in *Arulpragasan*. In my humble opinion, the Court of Appeal and the Federal Court should have adopted the purposive approach in interpreting the words '*prima facie* case' in s. 180 of the CPC. Section 17A of the Interpretation Acts 1948 and 1967 provides:

> **Regard to be had to the purpose of Act.**
>
> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Section 17A is a codification of the common law principle of statutory interpretation: the mischief rule (also known as the rule in *Heydon*'s case [1584] 3 Co Rep 7a). Of late, the Federal Court has from time to time emphasized the importance of the purposive approach and of referring to the *Hansard* for the purpose of statutory interpretation. In *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oil Sdn Bhd* [2004] 2 CLJ 265 Haidar Mohd Noor CJ (Malaya) said:

> It is clear beyond doubt that in view of s. 17A of the Interpretation Acts 1948 and 1967 there is now a statutory recognition for the courts to take purposive approach in the interpretation of statutes including tax statutes.

In *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikin Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57 the Federal Court said (at p. 69):

> Recently, the Federal Court in a majority judgment in *Lam Kong Co. Ltd. v. Thong Guan Co. Ptd Ltd* [2003] 3 CLJ 769 Mohamed Dzaiddin, FCJ, (now CJ Malaysia) took the purpose or object of the legislature as provided by s. 17A of the Interpretation Acts 1948 and 1967 (Act 388) for the construction of s. 68(1) (a) of CJA on the 'filter' principle. In view of the statutory recognition we can and should adopt a purposive approach in the interpretation of "Ruler" for the purposes of arts. 181, 182 and 183.

A In pursuing the purposive approach, one of the matters that can assist this court in interpreting the amended art. 181(2) and arts. 182 and 183 of the Constitution is to refer to the Parliamentary reports or *Hansard*. This is permissible as held by the Federal Court in *Chor Phaik Har v. Farlim Properties Sdn. Bhd.* [1994] 4 CLJ 285.

B

I should also add that the Federal Court, has also, from time to time, for the purpose of statutory interpretation and the purposive approach, referred to the Explanatory Statement to the Bill of the statute that the Court was called upon to interpret, to ascertain
C the true intention of Parliament (see, for example, *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 4 CLJ 105; and *United Malacca Bhd v. Pentadbir Tanah Daerah Alor Gajah* [2002] 4 CLJ 177).

D Yet, with the greatest respect, it is very unfortunate that on a matter of such fundamental importance as ascertaining the meaning of '*prima facie* case' in the amended (or new) s. 180 and bearing in mind the controversy over the Federal Court's decision in Arulpragasan that eventually led to Parliament's intervention (and
E hence the amendment to s. 180 of the CPC), the Court of Appeal in *Looi Kow Chai* and the Federal Court in *Balakrishnan* did not in their judgments refer either to the Explanatory Statement to the Bill or to the *Hansard* to ascertain the true intention of Parliament when amending s. 180 of the CPC.

F

But to be fair to the Court of Appeal in *Looi Kow Chai,* on the intention of Parliament, Gopal Sri Ram JCA did, however, say:

In our judgment Parliament by the phrase *"prima facie"* case intended to reverse the majority of the Federal Court in
G *Arulpragasan Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 and to statutorily codify the minority view in that case.

It is true, as the *Hansard* has shown, that Parliament in amending s. 180 of the CPC did intend to reverse the majority judgment in
H *Arulpragasan*. But, with the greatest respect, it is not quite accurate to say that Parliament intended to codify the minority view in *Arulpragasan*, that is to say, the judgments of Anuar Zainal Abidin CJ (Malaya) (whose judgment can be found at [1996] 4 CLJ at p. 686i and at [1997] 1 MLJ 389), Mohd Azmi FCJ and
I Mohamed Dzaiddin Abdullah FCJ. Firstly, neither the Explanatory

Statement to the Bill nor the Minister in his lengthy speech in Parliament (as reported in the *Hansard* and as set out extensively above) makes any mention of either the judgment of Anuar Zainal Abidin CJ (Malaya) or the judgment of Mohd Azmi FCJ or the judgment of Mohamed Dzaiddin FCJ; instead, the Minister in his speech in the Dewan Rakyat did repeatedly mention the correctness and his approval of the Privy Council's ruling in Haw Tua Tau. Further, one cannot generalize on the minority judgments; for, between them, there are various shades. Anuar Zainal Abidin CJ (Malaya) and Mohamed Dzaiddin FCJ are simple, clear and forthright in their approach: they are strict adherents of the *Haw Tua Tau* principle; and, in their learned judgments, consistently and unequivocally stood by the 'some evidence' test as propounded by Lord Diplock. Mohd Azmi FCJ, on the other hand, in his lengthy judgment, concentrates more in criticising the Federal Court judgment in *Khoo Hi Chiang* and repetitively stressing the obvious point that a court at the close of the prosecution case should not make a definitive or conclusive finding on the guilt of the accused – a point which I think even the majority in *Arulpragasan* would not disagree. But with the greatest respect, a difficulty that I find in following his lordship's well researched judgment is this: while Mohd Azmi FCJ refers from time to time to the *prima facie* case principle, his lordship is not quite clear on his stand as to the minimal evaluation test as propounded by *Haw Tua Tau*. Whilst the judgment of Lord Diplock in *Haw Tua Tau* only requires the court to consider whether there is some evidence not inherently incredible (in order to determine as to whether or not to call for the defence) and to keep an open mind about the veracity and accuracy of recollection of any individual witness, Mohd Azmi FCJ speaks of 'beyond reasonable doubt evidence'. Indeed, his lordship at times appears to be agreeing (or, rather, very close to agreeing) to the 'provisional beyond reasonable doubt' principle as advocated by the majority decision in *Arulpragasan*. This can be seen when his lordship said:

A B C D E F G H I

(a) (at page 20):

> Conversely, a **"beyond reasonable doubt case" (unless it is applied on a hypothetical basis)** is one which is already conclusive and would therefore be inconsistent with the words "if unrebutted" in s. 180. (emphasis added.)

A (b) (at page 28):

> The requirement of a finding of guilt on a **beyond reasonable doubt** basis by the Court under s. 180, **other than on a hypothetical basis,** would indeed in the words of Lord Diplock "run counter to the concept of what is a fair trial" on the
B adversarial system of criminal trials. (emphasis added.)

(c) (at page 28):

> In the process of weighing the evidence for the purpose of establishing a *prima facie* case, the court should not accept such
C evidence as credible, **unless it is beyond reasonable doubt evidence,** but such acceptance of evidence proving the essential ingredients of the charge, need not be conclusive on the guilt of the accused, but it should only be **on a hypothetical basis** that no further evidence would be forthcoming, and as such the court
D must keep an open mind on the question of guilt till the conclusion of the trial. (emphasis added.)

The learned Federal Court Judge appears to be of the opinion that, at the conclusion of the prosecution case, it is correct in principle to require a court to evaluate the prosecution evidence
E by applying the beyond reasonable doubt test, in order to determine as to whether or not a *prima facie* case has been made, provided it is on a hypothetical basis. But what is 'on a hypothetical basis', a phrase repeatedly used by his lordship? To my mind, by 'on a hypothetical basis', his lordship must have
F meant 'on a provisional basis'. If this is what his lordship meant, then, there is conceptually no difference between his lordship's view and the view of the majority in *Arulpragasan* and that whatever differences there are, between them, as indicated by their respective judgments, are, in the final analysis, mere semantics
G in nature.

Prior to its amendment, the controversial s. 180 of the CPC reads:

> When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which
H if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does no so find, shall call on the accused to enter on his defence.

As subsequently amended by the Criminal Procedure (Amendment)
I Act 1997, s. 180 now reads:

180. Procedure after conclusion of case for prosecution.

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

It will be noted from the above provisions (both the original and the amended texts) that Parliament with the view to overcoming the difficulties faced by the prosecution in securing convictions, as a consequence of the *Arulpragasan* ruling, has introduced the term '*prima facie* case' in the new s. 180. But what does the term '*prima facie* case' means? The inherent weakness in the drafting of the new s. 180 is that nowhere is the term '*prima facie* case' defined. Undefined, the term '*prima facie* case' can mean different things to different people (see, for example, *Tan Ah Ting v. Public Prosecutor* [1974] 2 MLJ 38, which I had mentioned earlier, where Wan Sulaiman FJ, in reversing a judgment that I made as a Kuala Lumpur magistrate over 30 years ago, observed that the terms '*prima facie* case' and *prima facie* evidence' have suffered from lack of uniformity in their meaning). The legal draftsman of the amendment Bill (as well as the Hon. Minister moving the Bill in Parliament) appears to assume that everyone (especially judges and lawyers) understood the term to mean the minimal evaluation principle as enunciated in *Haw Tua Tau.* Such an assumption, if indeed it was made, should not have been made, particularly, considering that even the judgment in *Haw Tua Tau* itself never used the term '*prima facie* case'. In the light of the manner that the case law has now developed in this country, being contrary to the intention of Parliament, as exemplified by *Looi Kow Chai* and *Balachandran*, perhaps, it would be a wise and logical move for Parliament to amend the new s. 180 by inserting a definition of the words '*prima facie* case' that will state in clear terms the intention of the 1997 amendment of the CPC.

Now, having made the above critical analysis, I am, unfortunately, in no position to accede to the learned DPP's request that I ought not to follow *Looi Kow Chai* and *Balachandran*, however much I share his sentiments. It is elementary that notwithstanding whatever misgivings and reservations I have on the decisions of these two cases, I am bound by the basic principle of binding precedent. Therefore, I must respect and follow the decisions. They are decisions of higher courts.

Now, applying the principle of maximum evaluation to the prosecution evidence in the present case, as I am bound to, it is my finding that the prosecution has failed to establish against the accused a *prima facie* case of selling cannabis on the Hulu Bernam Road on the day in question. Although there is evidence that he was driving car AW 163 along that road and that the boot of the car contained a large quantity of cannabis, yet it is clear that there is no evidence whatsoever that a sale transaction ever took place between him and PW12 along the Hulu Bernam Road.

However, as at the time of the arrest the accused was the driver and the person in possession of the car AW 163 that was detained and found to contain the drugs, and as the evidence shows that even when at the Tanjong Malim rest house he was aware of the presence of the cannabis in the boot of the car, I am of the view that the prosecution has succeeded in establishing against him a *prima facie* case of the commission of the offence of possession of the specified quantity of cannabis, an offence provided for by s. 6 of the DDA and punishable by s. 39A(2) of the same Act.

As has been said at the beginning of this judgment, when the charge was amended to that of possession of cannabis the accused pleaded guilty to the charge. The maximum sentence is life imprisonment. I sentenced him to 12 years imprisonment with effect from the date of arrest. In sentencing I took into account the following factors:

(1) the large quantity of the cannabis found in his (the accused's) possession and his intention to sell them; and the likelihood of harm to society;

(2) the plea of guilty, which has saved public expenses and judicial time;

(3) the fact that the accused has no record of any previous conviction; and

(4) the fact that the accused has shown remorse for his act; and

(5) the frequency of the commission of offences involving drugs, and the seriousness of the problem of drug addictions in this country.

Although s. 39A (2) provides for the imposition of whipping, I did not impose on him any sentence of whipping: for, in view of his age (54 years old), s. 289(c) of the CPC disallows me from doing so.